No. 00-507

In The

Supreme Court of the United States

THE CHICKASAW NATION AND
THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE SAN MANUEL BAND OF SERRANO MISSION INDIANS IN SUPPORT OF PETITIONERS

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I. Interests of Amicus Curiae

The amicus curiae San Manuel Band of Serrano Mission Indians (hereinafter "San Manuel Band" or "Band") files this brief in support of petitioners Chickasaw Nation and Choctaw Nation of Oklahoma pursuant to the parties' consent.[1]

The San Manuel Band is a federally recognized Indian Tribe located in southern California. *See* 65 Fed. Reg. 13298, 13301 (March 13, 2000) (listing federally recognized Tribes). The Band has historically lacked the ability to raise governmental revenues through taxation and other means typically used by the United States and the several states to fund necessary governmental programs including health, education, housing, roads, and water projects. It is only through the development of a governmental gaming project pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 (hereinafter "IGRA"), that the Band has been able to effectively exercise its sovereignty by raising revenue to create and implement vital governmental programs to improve its members' lives.

For these reasons, the Band has a substantial interest in supporting the petitioners in urging the Court to reverse the decision below.

II. Summary of Argument

The federal wagering excise and employment taxes at issue in this case only apply to lotteries "conducted for profit." For profit activities under the Internal Revenue Code

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[1] Copies of the parties' written consents are filed herewith. S.Ct. R. 37(3)(a). As required by Supreme Court Rule 37(6), counsel for the San Manuel Band note that they have authored this brief in whole, and that no other person or entity contributed monetarily to the preparation or submission of this brief.

are those for which income tax deductions are allowable. Indian tribal governments are not taxable entities for purposes of federal income tax. Because tribes are not taxable, they are not allowed deductions, and thus their activities are not for profit within the Internal Revenue Code's meaning. Because tribal governmental gaming is not "conducted for profit," it is not subject to the taxes at issue here.

This interpretation of the Internal Revenue Code harmonizes the IGRA(s) plain language, purposes and legislative history. It also promotes federal Indian policy and the unique trust relationship between the United States and Indian tribes. It is consistent with general principles of sovereignty. Finally, it also reflects an appropriate deference to Congress.

For these reasons, the amicus curiae San Manuel Band of Serrano Mission Indians respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

III. Argument

A. The Taxes At Issue Here Only Apply to Lotteries "Conducted for Profit"

The excise tax at issue in this case applies to "any wager authorized under the law of the State in which [it is] accepted ...." 26 U.S.C. § 4401(a)(1). The related occupational tax at issue applies to persons subject to the wagering excise tax of section 4401, or to those who receive "wagers" on behalf of such a person. *See* 26 U.S.C. § 4411. A "wager" is "any wager placed in a lottery conducted for profit." 26 U.S.C. § 4421(1)(C).

A threshold question, therefore, is whether the petitioner tribes conduct a lottery "for profit." *Id.* For if a

tribal government's gaming activity is not "conducted for profit," 26 U.S.C. § 4421(1)(C), then it is not a "wager" and is not subject to the excise and occupational taxes at issue here.

B. "For Profit" Activities Are Those For Which Income Tax Deductions Are Allowable

The "starting point" of all statutory interpretation is "the plain language of the statute itself." *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 512 (1981) (*citing Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). Chapter 35 of the Internal Revenue Code (hereinafter "Code" or "IRC"), governing "Taxes on Wagering," does not define the term "profit." *See* 26 U.S.C. § 4411 ("definitions"). Nor do the Code's general definitions define the term "profit." *See* 26 USCA § 7701.

We are aided, however, by "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (*quoting Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)) (internal quotations omitted).

Thus we may turn to the Code's only guidance on this question, which is found in section 26 USCA § 183 (c), defining "activity not engaged in for profit." *Id.* Section 183(c) provides that "[f]or purposes of this section, the term 'activity not engaged in for profit' means any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under paragraph (1) or (2) of section 212." *Id.* Section 162, in turn, provides in relevant part that "[t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business ...." 26

U.S.C. § 162(a). Similarly, section 212 allows "as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year – (1) for the production or collection of income; [or] (2) for the management, conservation, or maintenance of property held for the production of income ...." 26 U.S.C. § 212(1)-(2).

To summarize, "activities not engaged in for profit," are "any activity other than one with respect to which" income tax deductions are allowable. *Id.* at § 183(c).

This conclusion is consistent with generally-accepted definitions of the term "profit." For example, Black's Law Dictionary defines "profit" as "most commonly, the gross proceeds of a business transaction less the costs of the transactions." Black's Law Dictionary 1090 (5th ed. 1979). Governmental actions aimed at raising revenue to fund governmental programs, by contrast, are not commonly thought of or referred to as "business transactions." *Id.*

C. Indian Tribal Governments Are Not Taxable Entities For Purposes of Federal Income Tax

As the leading authority on federal Indian law notes, "Indian tribes are not taxable entities under the income tax provisions of the Internal Revenue Code." F. Cohen, *Handbook of Federal Indian Law*, 390 (1982 ed.) (hereinafter "Cohen") (*citing* I.R.S. Rev. Rul. 67-284, 1967-2 C.B. 55, 58; Memo. Sol. Int., May 1, 1941, *reprinted in* 1 OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1917-1974, at 1044 (Washington: Government Printing Office, n.d.).[2]

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[2] This Court has consistently relied on Cohen's expertise in the area of federal Indian law since the work's initial publication in 1942. *See, e.g., Babbitt v. Youpee*, 519 U.S. 234, 237 (1997); *Hagen v. Utah*, 510 U.S. 399, 402 (1994); *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114, 124 (1993); *South Dakota v. Bourland*, 508 U.S. 679, 698 (1993);

The Internal Revenue Service first held more than three decades ago that "the political entity embodied in the concept of an Indian tribe has been recognized and no tax liability has been asserted against a tribe with respect to tribal income from activities carried on within the boundaries of the reservation." Rev. Rul. 67-284.[3] Unlike shareholders in a

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County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 254 (1992); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 793 (1991); *Duro v. Reina*, 495 U.S. 676, 689 (1990); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 n. 16 (1989); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 435 (1989); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 520 (1986); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 885 (1986); *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985); *Solem v. Bartlett*, 465 U.S. 463, 466 n. 6 (1984); *Arizona v. California*, 460 U.S. 605, 651 (1983); *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 165 n. 1 (1980); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 657 n.1 (1979); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 199 n. 9 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 86 (1977); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 159 (1973); *Federal Power Com'n v. Tuscarora Indian Nation*, 362 U.S. 99, 133 n. 12 (1960); *Williams v. Lee*, 358 U.S. 217, 219 (1959); *Creek Nation v. United States*, 318 U.S. 629, 639 (1943); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 325 n. 5 (1942).

[3] Though the on-reservation location of tribal activity no longer is relevant, *see* Rev. Rul. 94-16 ("income earned by an unincorporated tribe, regardless of the location of the business activities that produced the income, is not subject to federal income tax"), tribal governmental gaming must take place on reservation (or equivalent) lands. *See* Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1) (class III gaming activities lawful only on "Indian lands"); *id.* at § 2710(a)(2) (class II gaming lawful only on "Indian lands"); *id.* at § 2703(4) ("Indian lands" defined as "all lands within the limits of any Indian reservation" or, similarly, other federal trust lands over which the tribe exercises governmental power).

corporation, "[t]he assets of an Indian tribe are owned by the tribe as a community and not by the members either as individuals or as tenants in common. The right to participate in the enjoyment of tribal property depends on continuing membership in the Indian tribe." *Id.* (*citing Gritts v. Fisher*, 224 U.S. 640, 642 (1912)).

Subsequent IRS rulings over the ensuing decades have reaffirmed this position. "Neither an unincorporated Indian tribe nor a corporation organized under section 17 of the Indian Reorganization Act of 1934 is subject to federal income tax on its income, regardless of the location of the activities that produced the income." Rev. Rul. 94-16. The IRS explained in unequivocal terms that "[b]ecause an Indian tribe is not a taxable entity, any income earned by an unincorporated tribe, regardless of the location of the business activities that produced the income, is not subject to federal income tax." *Id.*[4]

"[T]ribes have been consistently treated by the Internal Revenue Service as other than taxable entities under every income tax statute." Cohen, at 390 n. 8. The Code taxes the income of every "individual," "estate and trust" and "corporation." *See* 26 U.S.C. §§ 1, 1(e), 11. *See also* Cohen at 390. The Code does not, however, tax Indian tribal governments, which are "unique aggregations," *United States v. Mazurie*, 419 U.S. 544, 557 (1975), "like no other legal entities." Cohen at 390.

[4] This Court has deferred to positions reflected in a longstanding series of Revenue Rulings consistently adhering to the same position in a variety of fact patterns. *See, e.g., National Muffler Dealers Assn., Inc. v. United States*, 440 U.S. 472, 483-484, and nn. 16-19 (1979).

D. Because Tribes Are Not Taxable, They Are Not Allowed Deductions, and Thus Their Activities Are Not For Profit, Within the Code's Meaning

Because tribal governments are not taxable entities subject to federal income taxation, they are necessarily not allowed any deductions for their expenses incurred in operating governmental gaming enterprises. If an "activity is not engaged in for profit, no deduction attributable to such activity shall be allowable ...." 26 U.S.C. § 183(a). The regulations similarly provide that "[n]o deductions are allowable for expenses incurred in connection with activities which are not engaged in for profit." 26 C.F.R. § 1.183-2. Deductions are only allowable -- indeed only make sense -- in the context of taxable income. Section 63 of the Code generally defines "taxable income" as "gross income minus the deductions allowed by this chapter." 26 U.S.C. § 63. Since tribal governments have no taxable income, they necessarily have no gross income and no "deductions," within the Code's meaning. *Id.*

Thus tribal governmental gaming activities are "other than one[s] with respect to which deductions are allowable," and they are therefore defined as "activities not engaged in for profit," within the Code's meaning. 26 U.S.C. § 183(c). The Tenth Circuit's decision ignores entirely the question of whether tribal government gaming is "conducted for profit." 26 U.S.C. 4421(1)(c).

This interpretation of the Code resolves the ambiguity that otherwise exists in 25 U.S.C. § 2719(d)(1). *See Little Six, Inc,. v. United States*, 210 F.3d 1361, 1365 (Fed. Cir. 2000) ("§ 2719(d)(1) is ambiguous"); *Little Six, Inc. and Shakopee Mdewakanton Sioux (Dakota) Community v. U.S.*, No. 99-5083 (Dyk, J., dissenting from denial of rehearing en banc) ("there is no way to reconcile § 2719(d)'s literal [language regarding reporting and withholding of taxes] with its parenthetical reference to Chapter 35"); *Chickasaw Nation*

v. U.S., 208 F.3d 871, 883 (10th Cir. 2000) ("§ 2719(d)'s reference to Chapter 35 is somewhat cryptic").

Since tribal government gaming is not "conducted for a profit," 26 U.S.C. § 4421(1)(c), IGRA's language regarding "reporting and withholding of taxes" may be given its full effect. 25 U.S.C. § 2719(d)(1). Similarly, IGRA's parenthetical language referencing Chapter 35 also makes sense, particularly given that it does arguably contain provisions that relate to reporting and withholding information, the Tenth Circuit's contrary view notwithstanding. *See* 26 U.S.C. § 4424 ("Disclosure of wagering tax information").

E. This Interpretation of the Code Harmonizes IGRA's Purposes and Legislative History, Promotes Federal Indian Policy and the Trust Relationship, Is Consistent With General Principles of Sovereignty, and Reflects An Appropriate Deference To Congress

In addition to reflecting the plain language of the tax Code sections at issue, this analysis has much to recommend it. First, it harmonizes IGRA's purposes and legislative history. Second, it promotes federal Indian policy and the unique trust relationship between the United States and Indian tribal governments. Third, it is consistent with general principles of sovereignty. Finally, it reflects an appropriate deference to Congress. Each of these matters are addressed in turn.

1. This Interpretation of the Code Furthers IGRA's Purposes

In enacting IGRA, Congress found that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). IGRA's primary

purpose was to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

Thus Congress' findings and purposes in authorizing tribal gaming enterprises explicitly and clearly furthered federal Indian policies based on the governmental, sovereign aspect of tribal governments.

In aid of its policy of strengthening tribal governments, Congress strictly limited the uses to which tribes could put dollars generated through gaming enterprises:

> [N]et revenues from any tribal gaming are not to be used for purposes other than – (i) to fund tribal governmental operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

25 U.S.C. § 2710(b)(2)(A). Thus unlike the profits of a business, which can be put to any lawful use the owners desire, revenues from tribal governmental gaming enterprises may only be utilized in furtherance of Congress' policies.

The interpretation of the tax Code set forth above at sections III(A)-(D) of this brief would maximize tribal governments' realization of revenues from gaming activities under IGRA. That result directly supports Congress' primary goal of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

The Tenth Circuit's decision, on the other hand, would generate substantial governmental revenue for the United States. That was not, however, an express goal of Congress in enacting IGRA.

Congress' secondary purposes in enacting IGRA included providing a "statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences," to ensure the tribe is the "primary beneficiary" of the activity, and to assure that gaming is conducted fairly. 25 U.S.C. § 2702(3). By affirmatively requiring tribes to comply with the Code's reporting and withholding requirements, Congress furthered these secondary policies. *See* 25 U.S.C. § 2719(d)(1).

In sum, by expressly requiring tribes to report and withhold taxes on winnings, but not expressly taxing tribal governments, Congress was furthering its policy goals articulated in IGRA at 25 U.S.C. § 2702. By contrast, the Tenth Circuit's decision below does not further any identifiable congressional policy embodied in IGRA.

2. This Interpretation of the Code Harmonizes IGRA's Legislative History

Both the Tenth Circuit opinion and the Brief for the United States, previously filed herein, argue that an earlier version of the bill that became IGRA included a tax exemption for tribal gaming that was deleted before its passage. *See Chickasaw Nation v. United States*, 208 F.3d 871, 882-83 (10th Cir. 2000) (*citing Little Six, Inc. v. United States*, 43 Fed. Cl. 80, 83 (Fed.Cl.1999)). *See also* Brief for the United States, Chickasaw Nation v. United States, No. 00-507, at 8 (filed Dec. 22, 2000). From this the United States asserts that "Congress explicitly declined" to exempt tribal governments from wagering excise taxes. *Id.*

This argument ignores the fact that under existing law, no such exemption needed to be included in IGRA. As outlined above, because tribal government gaming is not "conducted for profit," it does not involve "wagers," within the meaning of Chapter 35 of the Code. 26 U.S.C. § 4421(1)(C). As such, the language the United States points to was deleted as surplusage. No other motive for the deletion appears in IGRA or its legislative history.

As between two alternative interpretations of IGRA's legislative history explaining the deletion of the word "taxation" from what would become 25 U.S.C. § 2719, the United States' view undermines IGRA's express purposes. The interpretation suggested in this brief, on the other hand, furthers those same policies.

3. This Interpretation of the Code Promotes Federal Indian Policy and the Unique Trust Relationship

Since the termination era's end,[5] Congress has consistently voiced its strong support for tribal self-determination and economic self-sufficiency. These policies are embodied in a variety of federal statutes including the Indian Financing Act of 1974, 25 U.S.C. §§ 1451, *et seq.*, the

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[5] The 1960s marked a sea change in federal Indian policy. President Johnson's "Special Message to the Congress on the Problems of the American Indian: 'The Forgotten American,'" proposed "a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership and self-help." 1968-69 Pub. Papers, pt. I, at 335-36 (Lyndon B. Johnson). President Nixon's 1970 statement on Indian affairs solidified the direction of modern federal Indian policy. *See* 116 Cong. Rec. 23258. President Nixon noted the termination policy's failure, stressed the continuing importance of the trust relationship between the federal government and tribes, and advocated a legislative program to support tribal governments in managing their own affairs and strengthening their autonomy. *See id.*

Indian Self-Determination and Education Assistance Act , 25 U.S.C. §§ 450, *et seq*., and most relevant to the case at bar, the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701, *et seq*.

The Indian Self-Determination Act "committed" the United States "to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 25 U.S.C. § 450a(b). As noted above, these are fundamentally the same policies embodied in IGRA. Recognizing that tribal government gaming is not "conducted for profit," 26 U.S.C. § 4421(1)(C), and thus not subject to the wagering excise tax and related employment tax, will "promot[e] tribal economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2702(1). By contrast, the Tenth Circuit's decision, if allowed to stand, will strengthen the federal government's "economic self-sufficiency," but weaken tribal governments.

Along with these important and settled federal Indian policies, this Court has also long recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983). *See Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). For close to two centuries "[t]his principle has long dominated the Government's dealings with Indians." *Mitchell*, 463 U.S. at 225.[6] This Court's decisions require the United States' trust obligations to Indian tribes be exercised

[6] *See, e.g., United States v. Mason*, 412 U.S. 391, 398 (1973); *Minnesota v. United States*, 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118 (1938); *United States v. Candelaria*, 271 U.S. 432, 442 (1926); *McKay v. Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock*,185 U.S. 373, 396 (1902); *United States v. Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)).

according to the strictest fiduciary standards. *See United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The trust obligation extends to all federal actions. *See Seminole Nation*, 316 U.S. at 297.

To read IGRA and the Code as taxing the beneficiary for the trustee's benefit, as the Tenth Circuit's opinion does, would be "an act of confiscation," of tribal sovereignty, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 219, 229 (1919), and would be inconsistent with the federal government's trust and fiduciary duties to tribes. Given that "'the power to tax involves the power to destroy,'" we should not be quick to assume Congress intended to tax tribes for the United States' benefit. *Atherton v. F.D.I.C.*, 519 U.S. 213, 221 (1997) (*quoting McCulloch v. Maryland*, 4 Wheat. 316, 431, 4 L.Ed. 579 (1819))

4. This Interpretation of the Code Is Consistent With General Principles of Sovereignty

This Court has historically required Congress to use express and unequivocal language when diminishing sovereign rights of Indian tribal governments.

For example, in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), this Court held that "'[a]bsent explicit statutory language,' this Court accordingly has refused to find that Congress has abrogated Indian treaty rights." *Id.* at 247 (*quoting Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 668, 690 (1979)). "The Court has applied similar canons of construction in nontreaty matters." *Oneida County*, 470 U.S. at 247. The Court "has held that congressional intent to extinguish Indian title must be plain and unambiguous," *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 346 (1941), and will not be "lightly implied." *Id.* at 354.

Relying on the strong policy of the United States "from the beginning to respect the Indian right of occupancy," *id.*, at 345 (*citing Cramer v. United States*, 261 U.S. 219, 227 (1923)), the Court concluded that it "[c]ertainly" would require "plain and unambiguous action to deprive the [Indians] of the benefits of that policy." 314 U.S. at 346. *See Oneida County*, 470 U.S. at 247-48. Similarly, in *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court held that Congress must "clearly evince" an intent to diminish reservation boundaries. *Id.* at 470.

In the sovereign immunity context, this Court has consistently held that congressional abrogation of tribal sovereign immunity must be clearly expressed. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed") *Turner v. United States*, 248 U.S. 354 (1919). The same rule applies to attempted federal abrogations of the states' sovereign immunity: "Congress may abrogate the States constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, __ , 120 S.Ct. 631, 640 (2000) (*quoting Dellmuth v. Muth.*, 491 U.S. 223, 228 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal quotations omitted). *See also Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 785 (1991) ("our cases require Congress' exercise of the power to abrogate state sovereign immunity, where it exists, to be exercised with unmistakable clarity").

The United States ignores this well-established doctrine regarding federal diminishment of sovereign rights of Indian tribes and states. Instead, it claims that "this Court does not require that Congress use explicit language to extend general federal tax statutes to Indians." Brief for the United States at 11-12. The government cites but one case in

support of its claim: *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418, 419-20 (1935). The United States fails to note, however, that the sole case it relies on involved federal taxation of an individual Indian person, not a tribal government. Given that it is tribal governments, not individual Indians, that possess sovereignty,[7] the United States' argument on this point is entirely unsupported.

Congress has not expressed an intent to subject tribal governmental gaming to the wagering excise tax and related occupational tax with a clarity that approaches the "nature of mathematical certainty." *Black's Law Dictionary*, 1370 (5th ed. 1979) (defining "unequivocal").

5. This Interpretation of the Code Properly Defers to Congress

Congress has defined "not for profit" in a way that excludes tribal governmental activity. 26 U.S.C. § 4421(1)(C). Given the strong federal policies supporting tribal governments and tribal economic development, and in light of the unique federal trust relationship with tribes, the federal courts should exercise a significant degree of deference to Congress before holding tribal governments subject to federal taxation.

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), this Court noted that, while it has taken a leading role in "drawing the bounds of tribal immunity, Congress, subject to constitutional

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[7] "Indian tribes have been recognized, first by the European nations, later by the United States, 'as distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." Cohen at 232 (*quoting Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519, 8 L.Ed. 483 (1832)) (hereinafter "Cohen").

limitations, can alter its limits through explicit legislation." *Id.* at 759. This deference acknowledged that "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests." *Id.* Congress' ability "to address the issue by comprehensive legislation counsels some caution by us in this area." *Id.* Because Congress has "'occasionally authorized limited classes of suits against Indian tribes' and 'has always been at liberty to dispense with … or to limit,'" tribal immunity, the fact that Congress "has not yet done so" continues to warrant judicial deference. *Id.* (*quoting Potawatomi*, 498 U.S. at 510).

Congress knows how to expressly subject tribes to federal regulation that impinges on tribal sovereign authority when it so chooses. *See, e.g.*, 25 U.S.C. § 450e-2 (tribal use of "excess funds" under self-determination contracts "shall be determined by the appropriate Secretary"); 25 U.S.C. § 695 (mandatory procedures for termination of federal supervision of tribal property of western Oregon Indians); *Santa Clara Pueblo*, 436 U.S. at 58 "discussing the Indian Civil Rights Act's abrogation of tribal sovereign immunity from habeas corpus actions". It has not done so with regard to wagering excise tax or the related employment tax at issue here.

IV. Conclusion

For these reasons, the amicus curiae San Manuel Band of Serrano Mission Indians respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

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